Nos. 18 and 36

In the Supreme Court of the United States

OCTOBER TERM, 1957

CITY OF DETROIT, A MICHIGAN MUNICIPAL CORPORATION, AND COUNTY OF WAYNE, A MICHIGAN CONSTITUTIONAL BODY CORPORATE, APPELLANTS AND PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, A DELAWARE CORPORATION, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM, AND WRIT OF CERTIORARI TO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

Cases—Continued

Miscellaneous—Continued

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan (R. 112–122) is reported at 132 F. Supp. 899. The opinion of the Court of Appeals for the Sixth Circuit (R. 271–277) is reported at 234 F. 2d 380.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1956. (R. 271.) Notices of appeal were filed by the City of Detroit (R. 278–280) and the

County of Wayne (R. 281–283) on July 25, 1956. The appeal was filed on September 10, 1956. Both the United States and the Murray Corporation of America filed timely motions to dismiss or affirm. An order of Mr. Justice Reed was entered on September 15, 1956, extending the time for filing a petition for writ of certiorari to and including November 13, 1956. The petition for a writ of certiorari was filed on November 13, 1956. On January 14, 1957, this Court granted the petition for a writ of certiorari and postponed further consideration of its jurisdiction on appeal to the hearing on the merits. (R. 284.) The jurisdiction of this Court on the writ of certiorari rests upon 28 U. S. C., Section 1254 (1). Appellants[1] assert jurisdiction on the appeal under 28 U. S. C., Section 1254 (2).[2]

QUESTIONS PRESENTED

The United States contracted with prime contractors for the manufacture of airplanes and parts for the use of the Air Force. The prime contractors subcontracted certain manufacturing to the Murray Corporation. The subcontracts, as approved by the Air Force Contracting Officer, each contain a clause providing that upon the making of partial payments to Murray, title to all inventories, materials, and work in-

[1] Throughout their brief the City of Detroit and the County of Wayne refer to themselves as appellants. We will likewise refer to them as appellants in this brief.

[2] The Government's argument that this Court lacks jurisdiction of the appeal is set forth in detail in the motion of the United States to dismiss or affirm, No. 401, October Term, 1956, to which we respectfully refer the Court.

process acquired or produced by Murray for the performance of the contract would vest in the United States. Following the making of partial payments, appellants assessed *ad valorem* personal property taxes to Murray on account of such property in its possession.

The following questions are thus presented:

1. Whether the partial payment clause itself was prohibited by any law and therefore ineffectual to vest title in the United States.

2. Whether the title which vested in the United States upon the making of a partial payment was, at most, a "paper" or security title.

3. Whether property of the United States may constitutionally be taxed by state or local authorities merely because it is in the possession of a private contractor and the tax is assessed to the contractor and not directly to the United States.

STATUTES INVOLVED

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 47–50.

STATEMENT[3]

1. *The contracts involved.*—The United States, Department of the Air Force, negotiated a prime letter contract with the Kaiser Manufacturing Corporation for the manufacture of airplanes, parts, tools, and sub-assemblies. (R. 142–168.) Kaiser could subcontract only upon the approval of the subcontracts by

[3] The facts are more fully set forth in the brief of the Murray Corporation.

the Contracting Officer of the Air Force. (R. 86.) The Kaiser contract provided for the making of partial payments by the Government to Kaiser upon certain terms and conditions. (R. 153, 161.) It was contemplated that partial payments would also be made to Kaiser's subcontractors following approval by the Contracting Officer of the terms of the subcontract. (R. 161–162.)

On March 23, 1951, Murray entered into a letter subcontract with Kaiser for the manufacture of certain of the parts and sub-assemblies which were required under Kaiser's prime contract with the Government, which subcontract was in effect on January 1, 1952. (R. 168–172.) On August 15, 1951, the letter subcontract, with the written approval of the Contracting Officer, was amended (R. 173–179) to provide for the making of partial payments to Murray upon property acquired or produced by it for the performance of the subcontract in the following terms (R. 174–177):

> 11. *Partial payments.*—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.
>
> (a) The Contracting Officer may, from time to time, authorize partial payments to The Murray Corporation of America (hereinafter called "the Contractor") upon property acquired or produced by it for the performance of this contract: *Provided*, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the property upon which payment is made, which cost shall be

determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; *Provided further*, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated partial payments, if any, made under this contract, exceed 80 percent of the contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided*, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor, Kaiser-Frazer Corporation, or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including without limitation, completed supplies, spare parts, drawings, information, partially com-

pleted supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial

payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceed thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provision

of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

In addition to the subcontract which Murray had with Kaiser, it also had, on January 1, 1952, a letter subcontract similar in nature and terms, with Wright Aeronautical Corporation (later Curtiss-Wright), which latter corporation held a prime contract with the Air Force similar to the prime contract of Kaiser. (R. 189–223.)

It was stipulated that in the negotiation of the Kaiser and Wright prime contracts, neither the contractors nor the Air Force considered the possible avoidance of local *ad valorem* and personal property taxes in determining whether partial-payment clauses would be inserted in the contracts. (R. 85.) The actual factors which the parties considered in arriving at a determination to include such partial-payment clauses were the needs of the contractor for partial payments as the work progressed in view of the period of time involved in the performance of each contract, together with the desire of the Air Force to maintain control of material and work in progress during the life of the contract so that such material could be moved elsewhere in the event of nonperformance. (R. 86.) Partial-payment clauses vesting title in the United States upon the making of a partial payment have been included in over 80 percent of fixed-price prime and subcontracts for the production of aircraft for the United States and in substantially a greater percentage of contracts, dollar-wise. (R. 86.)

From August 10, 1951, to December 20, 1951, Murray made requests of Kaiser on appropriate Government forms for partial payments under the terms of the subcontract. Following approval by the Contracting Officer, the requests were audited by the Air Force. (R. 47–48.) Prior to January 1, 1952, Murray received partial payments on the Kaiser subcontract in the sum of $163,949.20. Murray made similar requests for partial payments under the Wright subcontract and, prior to January 1, 1952, received $540,827.67 in approved partial payments. (R. 49–51.)

On January 1, 1952, the appellants assessed property in the possession of the Murray Corporation for the purpose of an *ad valorem* tax on its personal property for the year 1952. (R. 112, 116.) Included in the property assessed to Murray by the appellants were parts, materials, inventories, work in process and non-durable tools which had been acquired or produced by Murray for the performance of its letter subcontracts with Kaiser and Wright. This property, upon which partial payments had been made, as stated above, had an assessed value of over two million dollars. (R. 56–57.) Prior to, on, and subsequent to, January 1, 1952, the title to such property was vested in the Federal Government pursuant to the partial-payment clauses of the subcontracts (*supra*, pp. 4–8). Also, during this time the property was clearly identified as being owned by and belonging to the United States by tagging, labeling, or by segregation from other personal property owned by the Murray Corporation—and used by it—in connection with the conduct of its regular business. The aircraft operations

of the Murray Corporation were entirely separate from its other operations. (R. 57, 97.) Handling and accounting procedures did not differ following the receipt of partial payments since from the beginning of operations under the subcontracts Murray intended to receive payments under standard partial-payment clauses. (R. 96, 98.) None of the property acquired by Murray for the letter subcontracts was used for any purpose other than performance under those contracts, except in a few isolated instances where Murray, at Government direction, made transfers to other Government contractors. (R. 98.)

2. *The litigation.*—Subsequent to the assessment by the appellants of the 1952 *ad valorem* personal property taxes upon the property here involved, Murray paid the taxes under protest, and brought three consolidated suits for refund, on the theory that the tax was attributable to tax-exempt property of the United States.[1] (R. 3–11, 22, 37–38.) Murray sought refund of $67,714.96, plus interest, from the City of Detroit; and $12,572.66, plus interest, from the County of Wayne. (R. 84.) The United States intervened as a party-plaintiff, claiming ownership of the property on which the assessment was made. (R. 76–81, 117.)

Following the filing of a motion for summary judgment by Murray, supported by stipulations and depo-

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[1] The Murray Corporation has not billed the Government nor been directly paid or reimbursed for the personal property taxes here involved. The taxes are, however, an element in both retrospective and prospective price redeterminations under the subcontracts. (R. 99.)

sitions and the agreement by the parties that there was no genuine issue of any material fact, the District Court entered judgments against the taxing authorities. (R. 122–126.) On appeal, the Sixth Circuit affirmed. (R. 271–277.) On January 14, 1957, this Court granted a petition for a writ of certiorari and postponed the question of its jurisdiction on appeal to the hearing of the case on the merits. (R. 284.)

SUMMARY OF ARGUMENT

1. Appellants' contention that the contracting officers of the Air Force were without authority to provide for the making of partial payments whereby the United States acquired ownership of the contract property is without basis in the statutes or the decisions of this Court. Unless there is a statutory direction to follow, or prohibition against, a particular course, the Executive Department may follow any course which it deems to be in the best interests of the Government in procuring authorized materials. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 116.

There is nothing in the statutes which prohibits the course here followed. Section 3648, Revised Statutes, as amended, which prohibits the making of *advance* payments and which is relied on by appellants, has been interpreted for over sixty years as permitting the making of *partial* payments (which are involved here), provided the United States thereby acquires title to the property on which the payments were made. In addition, with respect to negotiated contracts, the Armed Services Procurement

Act of 1947 gives broad powers to the Secretary of the Air Force to enter into any type of contract, including one calling for the making of partial payments and the vesting of title to the property in the United States. This is in keeping with the War Department Regulations and practice of long standing. At the time the Armed Services Procurement Act was passed, that Department had already issued new regulations anticipating the requirements of the bill which became the law. Those regulations continued in effect the established practice with respect to partial payments. Regulations of such long standing and effect should be sustained.

2. Appellants' assertion that the title of the United States in the property here involved was mere "paper" title and not ownership is not supported by the terms of the contract or the treatment of the property by the parties. The language is clear, to the point, and unequivocally expresses ownership. It is the language which the courts, including this Court, have consistently approved or used to express such a meaning.

Certain clauses pointed to by appellants do not give to the Murray Corporation rights indicative of ownership. When read in their context they support the conclusion that ownership was in the United States, as the partial-payments clause provided. They were included in the subcontracts, not to reduce the quantum of the title held by the Government but to simplify and expedite the transfer of property from the Government.

Appellants' assertion that partial payments represent a form of financing is true but entirely consistent with the Government's acquisition of title. By such payments a contractor is reimbursed for most of the capital which he must advance for materials and labor to perform his contract. His need for capital is thereby reduced. The fact that the Government has reimbursed him for the major part of the cost of producing the property, however, does not raise an inference that the parties intended, contrary to the contract terms, that the ownership of the property should remain in the contractor and the United States acquire merely a security title. Ownership of the property itself is the only means whereby the Government can maintain necessary control over defense material in process of production, and the best means whereby the Government's investment in the property may be recovered.

3. The property on which the *ad valorem* property taxes were here assessed, being property of the United States, is immune from taxation by appellants. Such property is not subject to local property taxation merely because the property is in the possession of another, or merely because the tax is to be paid by a private party. *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. Neither form nor nomenclature of a tax is controlling over substance. If the tax is in substance a tax on the property of the Federal Government, the tax must fail.

ARGUMENT

The ultimate issue in this case involves the constitutional right of local taxing authorities to assess an *ad valorem* tax on property of the United States, the property consisting of inventories, materials, and work in process in the possession of a subcontractor, title to which had passed to the United States when the subcontractor received partial payments on the contract as work progressed. Because of various arguments advanced by the appellants, it becomes necessary to first dispose of their assertions that real title did not pass, and that the property in question did not belong to the United States. We shall then show why the immunity of the United States precludes the imposition of the contested tax.

With respect to the preliminary question, it is undisputed that, by giving the terms of the applicable contracts their customary meaning,[1] ownership of the property involved had passed to the United States at the time the property was taxed to the Murray Corporation. *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *In re Read-York, Inc.*, 152 F. 2d 313 (C. A. 7th); *Douglas Aircraft Co.* v. *Byram*, 57 Cal. App. 2d 311; *Craig* v. *Ingalls Shipbuilding Corp.*, 192 Miss. 254; *State ex rel. Superior S. B. Co.* v. *Beckley*, 175 Wis. 272. Cf. *Wright Co.* v. *Glander*, 151 Ohio, 29; *In re American Boiler Works*, 220 F. 2d 319 (C. A. 3d); *Thomson Mach. Works Co.* v. *Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913 (N. D. Calif.);

[1] See, *e. g.*, Paragraph 11 (b) of Kaiser's contract with Murray. (R. 175.)

United States v. *Lennox Metal Mfg. Co.*, 225 F. 2d 302 (C. A. 2d). But see *American Motors Corp.* v. *City of Kenosha*, 274 Wis. 315, pending on appeal in this Court, No. 343, this term. Appellants' principal contentions are: (1) the contract provisions by which title passed must be disregarded because the Government procurement officers lacked Congressional authority to include such provisions in the contracts, or (2) if title passed to the United States, then by reason of other provisions in the contract and the conduct of the parties, the title of the United States was merely a "paper title" and the real or beneficial title was vested in the Murray Corporation.

I

THE FEDERAL GOVERNMENT CONTRACTING OFFICERS CLEARLY POSSESSED THE AUTHORITY TO CONTRACT TO MAKE PARTIAL PAYMENTS DURING THE PROGRESS OF WORK UNDER A GOVERNMENT CONTRACT WHICH PROVIDED THAT SUCH PAYMENTS ARE CONDITIONED ON THE UNITED STATES' OBTAINING AT THE SAME TIME OWNERSHIP OF THE PROPERTY PRODUCED OR ACQUIRED UNDER THE CONTRACT

In taking the position that the Air Force officers were without authority to provide for the making of partial payments conditioned on the acquisition of ownership of the contract property, appellants rely (Br. 28–29) on what they claim to read as prohibitions contained in Section 3648, Revised Statutes, as amended (Appendix, *infra*, p. 50), and (Br. 29–32, 46) on the alleged lack of express authority in the Armed Services Procurement Act of 1947, 62 Stat.

21 (Appendix, *infra*, pp. 47–49).[5] The lack of an express statutory authority in the latter Act, they suggest (Br. 33–37), becomes more compelling in their favor by reason of what they read in other acts as clear indications of a Congressional policy to permit only the taking of a lien to secure the payments made.

It is our view that there is more than ample authority for the Government's making partial payments based on the progress of the contract and, at the same time, acquiring title to all of the property involved. Further, when we refer to the term "title," as used in the contracts, we mean ownership of the property and not a mere lien for security purposes. We might also point out that appellants do not appear to understand our position as to the source of the Government's authority for making such partial payments. Contrary to their belief (Br. 29), the Government does not need to and does not rely solely on authority contained in the Armed Services Procurement Act

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[5] Appellants apparently concede (Br. 36) that authority existed for the disputed provision under the First War Powers Act of 1941. Title II, First War Powers Act of 1941 (c. 593, 55 Stat. 838), as amended by Sec. 1 of the Act of January 12, 1951, and extended by Section 2 of that Act, c. 1230, 64 Stat. 1257 (Appendix, *infra*, pp. 49–50). Since, however, the Government chose to cite in the contracts (R. 143, 191) as its authority, the Armed Services Procurement Act of 1947, Sec. 2 (c) (10) (Appendix, *infra*, pp. 47–49), and to follow the procedures which were established under the authority of that Act, appellants seem to believe that the authority under the First War Powers Act became inoperative (Br. 36). We submit that the First War Powers Act clearly authorized the partial-payment clauses here in issue, but the Court need not reach that question in this case because of the authority which clearly exists under the Armed Services Procurement Act of 1947.

of 1947. However, if needed, we submit that authority is present in that Act. It is the Government's position that unless there is some statutory direction to follow a particular course, or there is some prohibition of a particular course, the Executive Department involved may follow any course which it deems to be in the best interests of the Government in procuring the authorized materials (*Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 116), including the making of partial payments and the acquisition, thereby, of property.

The capacity of the United States to enter into contracts is co-extensive with the duties and powers of Government (*United States* v. *Maurice*, 26 Fed. Cas. 1211, 1217; 2 Brock. 96, 110 (C. C. Va.)) and, within the constitutional powers confided to it, the United States through the proper department or agency may enter into contracts not prohibited by law which are appropriate to the exercise of those powers. *United States* v. *Tingey*, 5 Pet. 115, 127; *United States* v. *Bradley*, 10 Pet. 343, 359; *United States* v. *Linn*, 15 Pet. 290, 315–316; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 154; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*. Since the contracts involved arise from the war and defense powers delegated to the Federal Government, they clearly are authorized by the Constitution (*United States* v. *Allegheny County*, 322 U. S. 174, 182), and certainly there was no lack of adequate Congressional authorization to acquire the property in question. In 1950 the Air Force was authorized by Congress to procure 24,000 serviceable aircraft or

225,000 airframe tons aggregate of serviceable aircraft, together with guided missiles, spares, spare parts, equipment and facilities, for the maintenance and operation of the Air Force.[7]

Necessarily, many decisions had to be made by the Air Force on a variety of questions before the authorization could be translated into actual defense materials. As we have pointed out, in the absence of any prohibition of law, if the Authorization Act were the only law on the subject, its directive would have been carried out by the Air Force in the manner thought to be most appropriate. Whether the aircraft would be large or small, of a particular design, their cost, their method of procurement, the terms of the contracts, the methods of financing the manufacture, if necessary, and all other details relating to the procurement would have been determined by the Air Force. *United States* v. *Corliss Steam-Eng. Co.*, 91 U. S. 321, 322–323; 18 Op. A. G. 244 (1885); 29 Op. A. G. 285, 286 (1911). These details are incidents of the general authority to obtain the defense equipment which Congress directed to be procured, and they need not be set forth in legislation.[8] *United States* v. *Macdaniel*, 7 Pet. 1, 14; *United States* v. *Moga*, 97 U. S. 413, 420–421; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 385–386; *United States* v. *Birdsall*, 233 U. S. 223, 231, 235; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*. We think it clear that there is no basis for the proposition that an express statutory direction or permis-

[7] Army and Air Force Authorization Act of 1949, c. 454, 64 Stat. 331, Secs. 205–204.

[8] See also: Section 216, Revised Statutes, 5 U. S. C. 1952 ed., Sec. 190; Air Force Organization Act of 1951, c. 167, 65 Stat. 326, Secs. 101, 404.

sion must exist before partial payments may be made under the circumstances here. If appellants so contend, and their argument (Br. 30–31) based on *United States* v. *Arizona*, 295 U. S. 174, would seem to so indicate, their position is without authoritative support.

Therefore, unless there is some law which prohibits them, the acts of the Contracting Officers of the Air Force in approving the use of partial payments, and the transfer, therewith, of the ownership in the material and work in question, must be accepted as being within their authority. *United States* v. *Allegheny County, supra*, p. 182.

Concerning this point, appellants urge (Br. 28–29) that Section 3648, Revised Statutes, as amended, expressly, and the Armed Services Procurement Act of 1947, by implication, prohibit the making of partial payments where the United States takes title to the work.

A. SECTION 3648, REVISED STATUTES, AS AMENDED, DOES NOT PROHIBIT THE MAKING OF PARTIAL PAYMENTS

Section 3648, as amended, prohibits the making of *advance* payments of any kind. It also prohibits payments being made on a contract under circumstances where the Government does not at the time receive an equivalent. 18 Op. A. G. 101; 18 Op. A. G. 105. Also, it is at least doubtful, lacking an enabling statute, whether payments may be made on an uncompleted contract where only a lien is taken on the property for security purposes.[7] 20 Op. A. G. 746; 17 Comp. Dec. 894. So

[7] Such doubts have never been authoritatively settled. In those cases where a Government agency in its procurement policies has

far as we have been able to learn, however, the right of Government officers to make partial payments under a contract, provided the United States receives ownership of property of an equal value by title to the work in progress vesting in the United States at the time of the payment, has never previously been questioned. 18 Op. A. G. 105 (1885); 20 Op. A. G. 746 (1894); 29 Op. A. G. 46 (1911); 17 Comp. Dec. 231 (1910); 17 Comp Dec. 894 (1911); 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941); 28 Comp. Gen. 468 (1949). Compare: *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452. As was said by the Comptroller General with respect to an earlier airplane contract (1 Comp. Gen. 143, 145–146 (1921)):

> The provisions of this section [3648, Revised Statutes] do not necessarily preclude the making of any payment under a contract until the entire subject matter of the contract has been completed and turned over to the Government. Its prime purpose is to prevent the advancement to the contractor of funds with which to enable him to perform his contract. It was not intended to prevent a partial payment in any case in which the amount of such payment had been actually earned by the contractor and the

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followed the practice of making payments and acquired, at most, only a contractual lien, and the propriety of such payments has been questioned, Congress has corrected any legal defect in this practice by special legislation. See 20 Op. A. G. 746 (1894), followed by Joint Resolution 24, May 5, 1894, 28 Stat. 582, 26 Cong. Rec. pp. 3506–7, 4215–4216, 53d Cong., 2d Sess.; 29 Op. A. G. 46, 17 Comp. Dec. 231; 17 Comp. Dec. 894, followed by the Act of August 22, 1911, c. 42, 37 Stat. 32; H. Rep. No. 39, 62d Cong., 1 Sess.; S. Rep. No. 28, 62d Cong., 1st Sess.

> United States had received an equivalent therefor. 18 Op. Atty. Gen., 105; 20 *id.*, 746; 17 Comp. Dec. 894.
>
> In the case here presented the amount of the proposed partial payment in each instance is well within the amount actually expended by the contractor for work and material to go into the performance of the contract. Hence the proposed partial payments are not in excess of the amount actually earned by the contractor. And Article VIII expressly provides that title to all property on which partial payment is made shall vest in the United States forthwith upon the making of such partial payment. Therefore, the condition that the United States must receive a corresponding benefit in order to justify the making of a partial payment is also fulfilled. * * *

These views have been reaffirmed since the passage of the Armed Services Procurement Act of 1947. 28 Comp. Gen. 468, 470 (1949).

Thus, with respect to Section 3648, as amended, upon which appellants rely, we find that for over 60 years not only the chief law officer of the Government but also an officer answerable to Congress itself—and charged specifically with the duty of keeping all Government expenditures within lawful limits[10]—have read nothing in Section 3648 prohibiting the course the Government has followed in this case. On the contrary, this course is the only one which assures that no question can be raised that the payments were

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[10] Budget and Accounting Act, 1921, c. 18, 42 Stat. 20, Sec. 212.

in compliance with the requirements of Section 3648, as amended, and were validly made. Compare: 17 Comp. Dec. 894, 899; *United States* v. *Ansonia Brass & C. Co., supra.*

As has been said, the "[c]ourts are slow to disturb the settled administrative construction of a statute long and consistently adhered to." *Alaska Steamship Co.* v. *United States*, 290 U. S. 256, 262; *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501. And this becomes especially true when it must be assumed that Congress was aware of rulings in which the making of partial payments and the taking of title have been approved. 17 Comp. Dec. 231; 29 Op. A. G. 46. Under such circumstances, we think it is untenable to conclude now that Congress intended by Section 3648, as amended, to prohibit the making of partial payments, where the value of the services performed and the property acquired exceed the amount of the payments.[11]

B. THE ARMED SERVICES PROCUREMENT ACT OF 1947 AUTHORIZES THE MAKING OF PARTIAL PAYMENTS

In addition to Section 3648, Revised Statutes, as amended, appellants point to the Armed Services

[11] In their briefs below, appellants suggested that the amendment of Section 3648 in 1946 avoids the impact of prior administrative construction. It is not clear whether they still adhere to such a suggestion. In view of their statement (Br. 28) that Section 3648 is "relatively new" by recent amendment, we wish to point out that the 1946 amendment made no material change in the statute. The sole purpose of the amendment was to make it easier to enact specific exceptions to the broad prohibition against advance payments. H. Rep. No. 2186, 79th Cong., 2d Sess.; S. Rep. No. 1636, 79th Cong., 2d Sess.; 28 Comp. Gen. 468 (1949).

Procurement Act of 1947 as prohibiting the making of partial payments. Particular emphasis is placed on Section 5 of that Act (Appendix, *infra*, p. 48).

The Armed Services Procurement Act covers procurement by means of advertisement and bids as well as by negotiation. We are here dealing with negotiated contracts. Such contracts may be used, under certain circumstances, after a prescribed procedure has been followed.[12] It is agreed that those procedures were complied with here, and that the negotiation method of contracting in this case was proper. (R. 90.) Once this has been determined, Congress, by Section 4 of the Act, has expressly granted wide discretion to the agency head in determining the type of contract which will promote the best interests of the Government.[13] *Kern-Limerick, Inc.* v. *Scurlock*, *supra*, p. 116. This would include contracts calling for payments from time to time as the work progresses.

Appellants, however, urge (Br. 37–40) that the grant of power contained in Section 4 was intended to be a limited right merely to choose between several pricing arrangements and does not include the authority to make determinations with respect to other matters. To avoid the effect of the decision of this Court in *Kern-Limerick*, they suggest (Br. 41, 44) that a different conclusion might have been reached there if the history of the Act had been more fully

[12] Armed Services Procurement Act of 1947, Sec. 2, c. 65, 62 Stat. 21, Appendix, *infra*, p. 47.

[13] *Ibid*, Sec. 4, Appendix, *infra*, p. 47.

presented in the Government's briefs in that case. To support this view they quote (Br. 37–41) certain excerpts taken from the House hearings on H. R. 1366 (which was enacted as the Armed Services Procurement Act of 1947). If it is possible to give the quoted remarks the limited meaning for which appellants contend, the committees themselves did not so understand them. On this precise question it was said (H. Rep. No. 109, 80th Cong. 1st Sess., p. 19; S. Rep. No. 571, 80th Cong. 1st Sess., p. 17):

> Special provisions other than price provisions may bring about substantial savings of Government funds. Negotiation permits the working out of all terms, not just price, and their harmonization in a way which will be most advantageous to the Government. Special provisions adapted to the circumstances of the particular purchase may be of material importance in securing the best possible agreement for the Government. * * *

Even without the above legislative history, however, we think that the broad wording of Section 4 would carry with it authority to use "partial payments" provisions if, in the opinion of the agency head, they would promote the best interests of the Government. This, it is submitted, would be in keeping with the scheme of the statute which places the authority and responsibility for contract negotiation with the agency head and makes his decisions and determinations final.[14]. In the absence of affirmative

[14] Armed Services Procurement Act of 1947, Sec. 5 (a), Appendix, *infra*, p. 48.

reasons for a contrary conclusion, we submit that a narrower interpretation is not warranted.

There is left, then, only appellants' contention (Br. 38) that Section 5 of the Act prohibits the making of partial payments.[13] This section, however, relates not to the making of "partial payments" but to the making of "advance payments." At the time the Act was passed the term "advance payments" had long since become a term of art in the history of procurement laws and regulations, as had the term "partial payments."[14] The two terms are in no sense synonymous. The very nature of the payments is different. In the one case the payment is essentially a loan creating an indebtedness to the Government, while in the other it is a payment by the Government for services performed in its behalf. This distinction is made

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[13] *Ibid.*, Section 5, Appendix, *infra*, p. 48.

[14] See: Joint Resolution No. 24, May 5, 1894, 28 Stat. 582; Act of August 22, 1911, c. 42, 37 Stat. 32; Act of October 6, 1917, c. 79, 40 Stat. 345; Sec. 5, p. 383; Act of June 28, 1940, c. 440, 54 Stat. 676; Act of July 2, 1940, c. 508, 54 Stat. 712; First War Powers Act, 1941, c. 593, 55 Stat. 838, Sec. 201; Executive Order 9001 (December 27, 1941), 6 Federal Register 6787.

War Department Procurement Regulations (July 1, 1942), Secs. 81.321, 81.331, 81.347, 81.348, 7 Federal Register 6098, 6105, 6108, 6112, 6113.

War Department Procurement Regulations (August 25, 1945), Secs. 803.321, 803.330, 803.331, 10 Federal Register 10449, 10501–10503, 10507–10508.

Army Procurement Regulations (November 18, 1947), Secs. 804.400–804.407, 805.405, 805.407-2 (a) (b), 12 Federal Register 7692–7693, 7700, 7704–7705.

clear in the Armed Services Procurement Regulation, which provides: [17]

> 402.501 *Nature of advance payments.* Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. Advance payments are to be distinguished from "partial payments" and "progress payments" and other payments made because of performance or part performance of a contract.[18]

Furthermore, the history of Section 5 itself does not reveal an intent on the part of Congress to restrict the practices already being followed by the Services, either with respect to advance or partial payments.

The Armed Services Procurement Act of 1947 was drafted by persons who had extensive knowledge of, and concern with, the practical problems of Government procurement.[19] The bill which became the law

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[17] Armed Services Procurement Regulations, (November 23, 1950) Sec. 3.501, 15 Federal Register 8038, 32 Code of Federal Regulations (1949 ed.), Sec. 402.501.

[18] The term "partial payments," as used in earlier regulations, has now been changed in the Air Force Regulations to the term "progress payments", no doubt because the latter is more descriptive of the nature of the payments. Department of the Air Force Regulations (August 13, 1953), Secs. 1006.1309, 1006.1310, 18 Federal Register, 1796, 4829, 32 Code of Federal Regulations, Secs. 1006.1309, 1006.1310.

[19] As the House Committee on Armed Services said (H. Rep. No. 109, 80th Cong., 1st Sess., p. 5):

> The bill as introduced is a product of a great many months of intensive thought and effort. There is nothing ill-considered about the measure. It represents the best

was introduced at a time when there were existing War Department Procurement Regulations describing and making provisions for both "advance payments" and "partial payments." The latter provisions required that title to all property acquired for the performance of the contract should forthwith vest in the Government on the making of payments.[1] In fact, while H. R. 1366 was pending before Congress new Army Procurement Regulations were issued.[2] These regulations, anticipating the new procurement procedures, expressly limited themselves to the principles contained in H. R. 1366.[3] Here again, separate provisions were made for "advance payments" as distinguished from "partial payments", and as before, the latter provided for ownership to

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combined judgment of the officials and procurement experts in both Departments founded upon the unprecedented experience of purchasing almost two hundred billion dollars worth of matériel during the war. As originally introduced, it was thoroughly considered and approved by the Comptroller General. * * *

See also S. Rep. No. 571, 80th Cong., 1st Sess., pp. 21-26.

[1] H. R. 1366, 80th Cong., 1st Sess., 93 Cong. Record, Part 1, p. 610. War Department Procurement Regulations (August 25, 1945). See: 803.331, 10 Federal Register 10449, 10501-10503.

[2] War Department Procurement Regulations (August 25, 1945). Secs. 803.330, 803.331, 10 Federal Register 10507-10509.

[3] At the time the bill was introduced the basic authority for procurement was contained in Sec. 1 (a) and (b) of the Act of July 2, 1940, c. 508, 54 Stat. 712; the First War Powers Act, 1941, c. 593, 55 Stat. 838; and Executive Order 9001 (December 27, 1941), 6 Federal Register 6787.

[4] Army Procurement Regulations (November 18, 1947). Sec. 501.106, 12 Federal Register 7670.

vest in the Government.[24] The regulations applied to both Army and Air Force procurement and, in substance, continued in effect procedures formally promulgated at least as early as 1942,[25] and practices followed since 1921.[26] 1 Comp. Gen. 143 (1921).

Placing to one side for the moment all of the historical background of partial and advance payments, the terms of Section 5 themselves afford no basis for an argument that the section was intended to be restrictive of partial payments. It permits the making of advance payments up to the full amount of the contract, leaving the determination of the security to the agency head and only requiring that it be adequate.

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[24] Army Procurement Regulations (November 18, 1947), Secs. 804.400–804.407, 805.405, 805.407–2 (a) (b), 12 Federal Register 7692–7693, 7700, 7704–7705.

[25] War Department Procurement Regulations (July 1, 1942), Secs. 81.321, 81.330, 81.331, 81.347, 81.348, 7 Federal Register 6098, 6105, 6108, 6112, 6113. See also War Department Procurement Regulations (1945), Secs. 803.321, 803.330, 803.331, 10 Federal Register 10449, 10501–10503, 10507–10508.

[26] That the bill (H. R. 1366) contemplated that the existing practice with respect to partial payments would continue is made additionally clear by Colonel Brannon's testimony before a House Armed Services Subcommittee. There he introduced exhibits consisting of extracts from existing procurement regulations and examples of contracts with the statement that they were then in use and it might be anticipated they would continue to be used under the new law. 1 Hearings before House Committee on Armed Services in connection with H. R. 1366, 80th Cong., 1st Sess., p. 580. Each of the contract exhibits contained a section which provided that upon the acceptance of the contract by the contractor, "partial and advance payments, in accordance with regulations from time to time applicable, may be made to you upon your application." War Department Contracts Nos. 7, 8, 9, 10, Secs. 7, Hearings, *id.*, pp. 608–616.

Such terms carry no implication that the section was meant to be restrictive, in any sense. On the contrary, it was put into the statute to remove a restriction resulting from Section 3648, Revised Statutes, as amended, which prohibits the making of advance payments in any case, unless authorized by appropriation or law.[27] It is true that its effect was limited to negotiated contracts; but with respect to those contracts, it made fully effective the broad powers of negotiation which Congress intended to provide in Section 4. *Kern-Limerick, Inc.* v. *Scurlock, supra.* This is not consistent with the thought that Congress intended to give with one hand full rein to certain powers of negotiation in the exceptional case[28] and with the other to take away powers which were utilized in 80 percent of the cases. (R. 86.)

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[27] In this connection, the House Committee on Armed Services said (H. Rep. No. 109, 80th Cong., 1st Sess., p. 33):

> The experience gained by the agencies under emergency legislation permitting the granting of advance payment * * * has shown that a return to the strict principle set forth in section 3648, Revised Statutes * * * wherein advances of public moneys are forbidden in all cases, is undesirable. In many instances the granting of advance payments has enabled the Government to effect substantial savings. This section would permit the granting of advance payments in appropriate situations under provisions for security and repayment much like those employed by the agencies during the war years.

[28] See the testimony of Hon. Kenneth C. Royall, Under Secretary of War, and Hon. W. John Kenney, Acting Secretary of the Navy, respecting the policy of making advance payments. Hearings, *supra*, pp. 460–461. See also War Department Procurement Regulations (1945) Secs. 803.349-4, 10 Federal Register 10449, 10500.

Subsection (b) of Section 5 on which appellants place reliance for the proposition that the taking of title by the United States is prohibited likewise, by its terms, gives no support to their position. The subsection merely furnishes the agency head with an additional tool which he may use if he considers it appropriate.[20]

In summary, appellants are asking this Court to hold that the partial-payment clause is invalid notwithstanding that when the Armed Services Procurement Act was under consideration by Congress, the terms "advance payments" and "partial payments" had been known and distinguished for over sixty years; that regulations providing for "partial payments" with ownership vesting in the Government had been in force for a number of years and the practice of making such payments was of much longer standing; that the bill which became the law represented the combined judgment of the officials and procurement experts of the War and Navy Departments who were thoroughly familiar with the existing regulations; and that the new regulations, anticipating the Act, continued in force the "partial payments" provisions. In the face of these circumstances, neither logic nor law will support an inference that Congress intended to erase, by mere silence, over

[20] Subsection (b) of Section 5 provides that a lien may be taken as security for advance payments upon all credit balances, supplies and materials and, if taken, by the statute it is made a lien paramount to all other liens. The making of such liens paramount is the purpose of the subsection. It avoids, thereby, any question of the priority of the Government's lien. The problem is not a new one. See *United States* v. *Ansonia Brass & C. Co.*, *supra*.

forty years of practice and well-established regulations. It has long been established that a regulation of a department of the Government, reasonably adapted to the enforcement of an Act of Congress the administration of which is confided to such department, has the force and effect of law if it is not in conflict with express statutory provision. *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501; *United States* v. *Eliason*, 16 Pet. 291, 301, 302.

II

THE UNITED STATES ACQUIRED FULL OWNERSHIP OF THE PROPERTY WITH THE RECEIPT BY THE MURRAY CORPORATION OF PARTIAL PAYMENTS

As a second major proposition, appellants assert that their taxes were proper because the property in question was not owned by the United States but by the Murray Corporation. It is urged that the title of the Government was a "paper title", and that the real or beneficial title remained vested in the Murray Corporation, even after its receipt of partial payments.

We do not understand that appellants contend the language used in the subcontracts to transfer ownership to the United States is inept. It is the language which the courts have consistently approved or have themselves used to express such a meaning. *United States* v. *Ansonia Brass &c. Co.*, 218 U. S. 452; *United*

[30] *United States* v. *Ansonia Brass &c. Co.*, *supra*; 1 Comp. Gen. 143 (1921).

States v. *Allegheny County*, 322 U. S. 474; *In re Read-York, Inc.*, 152 F. 2d 313 (C. A. 7th); *Douglas Aircraft Co.* v. *Byram*, 57 Cal. App. 2d 311; *Craig* v. *Ingalls Shipbuilding Corp.*, 192 Miss. 254; *State ex rel. Superior S. B. Co.* v. *Beckley*, 175 Wis. 272; *In re American Boiler Works*, 220 F. 2d 319 (C. A. 3d). But see *American Motors Corp.* v. *City of Kenosha*, 274 Wis. 315, pending on appeal in this Court, No. 343, this Term. Compare: *United States* v. *Lennox Metal Mfg. Co.*, 225 F. 2d 302 (C. A. 2d). The language is clear and to the point. It provides (R. 175):

> Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production * * *.

This clause should be sufficient to give the Government ownership, since the rights and obligations created by a written contract are to be ascertained from the terms of the document, and its provisions are controlling in the absence of some positive rule of law. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–422. Furthermore, as we have shown, there is no rule of law preventing the United States from owning the property, and as was said with respect to

very similar language: "It would be difficult to state in more precise terms the conditions upon which title to the property vests in the Government." *In re Read-York, supra,* p. 316.

Appellants, however, argue (Br. 53) that the rights granted to the Murray Corporation under the contract, and the treatment of the property by the Government and the Murray Corporation, show that it was intended by the parties that the United States should not receive ownership of the property but merely a lien for security purposes. This being true, they assert that the taxes are proper under the decisions of this Court. *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558. We might say at this point, however, that some of the rights to which appellants refer are coupled with a responsibility towards the Government property, and are not rights flowing from the ownership of the property.

With respect to the treatment of the property by the parties, it is difficult to see, under the circumstances, how a different treatment could have been applied that would have been more clearly in keeping with the knowledge that the property was that of the United States. It was segregated from property owned by the Murray Corporation (R. 97). It was also identified by tags and labels showing the Government contract numbers (R. 97). It was not shown as a part of the Murray Corporation inventory, but instead, the cost was carried on the company books under an account known as "Defense Contracts Receivable—Control" (R. 96). Similar treatment was accorded in the Company's annual report (R. 97).

Before discussing the rights which appellants claim that the Murray Corporation had under the terms of the contract, we wish to quote the opening portion of the clause in which some of the rights referred to are allegedly found. This clause provides, in part (R. 176):

> It is recognized that "property" (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. * * *

This is not language which carries the normal implication that the ownership of the property mentioned is vested in the contractor. It forms a part of the context and bears on the meaning of the language which follows, and on which appellants rely (Br. 61–63) for their claim that the contractor has an unlimited right to acquire or dispose of the property. See also *American Motors Corp.* v. *City of Kenosha*, *supra*. This portion of the clause provides (R. 176):

> The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer. * * *.

Here again, we have language which carries no implication that the property which was put into the care, custody, or possession of the contractor may be acquired or disposed of by the Murray Corporation, except to the extent that it meets with the interests and approval of the Government. This view is further supported by the clause which provides that "[t]he agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition) shall * * * be paid or credited to the Government * * *." (R. 176.) The payment of an "agreed price" is customarily made to the owner of the property by the one acquiring it for the price. Without this provision no Contracting Officer could feel authorized to permit the purchase or other disposition of any of the property, no matter how much it might be in the interest of the Government.

An argument is made by appellants (Br. 63–64) that current production scrap could be sold by the contractor without the approval of the Contracting Officer. This provision, however, again gives no support to the proposition that the property or the scrap therefrom belonged to the contractor. Furthermore, it carries no implication that the contractor may sell for scrap what, in fact, is not scrap. To suppose otherwise would be to give to the term "scrap" a meaning of no known content. This is not the case. Scrap is defined in the regulations as property which has no reasonable prospect of sale except for its basic material content. Armed Services Procurement Regulations (February 29, 1952), Sec. 407.221, 17 Federal

Register 1791, 1793. If we assume that the contractor may sell it at any price he chooses, we must also assume that there is no regular established market price for such raw materials. But even with these assumptions, there is nothing to show that the contractor has more than the mere authority to act for and on behalf of the United States in the disposition of a very minor class of property. This right can hardly be indicative of ownership of even the scrap, to say nothing of inferring therefrom that it is indicative of ownership of all the property.

With respect to the assumption of risk proviso (R. 177) to which appellants refer (Br. 58–61), it might well be true as a general rule of law that the risk of loss normally rests with the property owner. But there is nothing which prevents such risk being placed elsewhere by contractual agreement. The risk of loss here falls on the contractor, not because it is the owner but because it accepted that risk as a condition to receiving payments on the contract. There is ample reason for the procurement officers to require the contractor to accept that risk. It is in accord with the decision of the Comptroller General in earlier rulings where Government property was to be left in the possession of a contractor. In those cases, he required that "the contractor shall be responsible absolutely, and not as a mere bailee." 20 Comp. Gen. 917, 919 (1941); see also 28 Comp. Gen. 468, 470 (1949). With the risk of loss of Government property on the Murray Corporation, the fact that the Company insured itself against loss on its own, as well as on prop-

erty "for which they are liable, all while located in and/or on the premises occupied by the insured" (R. 83), loses the significance which appellants would attach to it (Br. 60).

A further argument is made by appellants that the clause which they state (Br. 64) would cause the Government title to "revest" in the contractor on the liquidation of partial payments or completion of deliveries indicates that the title of the United States was a mere security title, and not ownership.

Without wishing to quibble over appellant's use of words, we point out that the contract provided that if and when the contingencies named should occur, "title * * * shall vest in the Contractor". (R. 175-177.) To the extent that words can accomplish that result, the draftsman of the provision has made clear that the title does not "revest" in the sense which appellants would have the Court accept, but that it shall be a new and distinct ownership as though it were acquired for the first time. This view is in keeping with the purposes for which it was included in the regulations as a standard contract clause. It is there explained as a proper amendment to contracts not containing the clause because it is "considered to be of advantage to the Government as simplifying and expediting the transfer and disposition of property acquired for and used in the performance of a contract * * *". War Department Procurement Regulations (August 25, 1945), Sec. 803.331a, 10 Federal Register 10508. One does not transfer and dispose of property which he does not own. We might

also add that the observations made in the quoted excerpt from the regulations are equally applicable to the provisions relating to the acquisition of property and the disposition of scrap which are also a part of subsection (d). War Department Procurement Regulations (August 25, 1945), Secs. 803.330, 803.331, 10 Federal Register 10507–10508.

To further support their position on this point, appellants give an example of a hypothetical liquidation of partial payments to show the alleged practical operation of the clause which vests title to the property in the contractor under such circumstances. (Br. 65.) They there assume that the partial payments represent one-quarter of the total contract price, and that goods equal in value to that amount are delivered to the Government. From this they conclude that the partial payments would be liquidated, that all of the remaining inventories, and work-in-process, still in the hands of the Murray Corporation under the subcontract, would be transferred by the subcontract to the company, and that it would then be the owner of property "which might possess a value far in excess of these partial payments." By this means they seek to attack the Government's claim of ownership by suggesting that the normal meaning of the words produce an extreme result which is to be avoided.

It is of course possible for some property to be on hand after the United States has received delivery of finished goods sufficient in value to balance the payments made on the contract. Such property would be owned by the Government, even though it paid

nothing for it. If that contingency should occur in any case, the clause referred to by appellants will merely act to correct the situation by transferring ownership from the Government to the contractor. That property of a great value would fall into this class, however, is not probable. The goods delivered represent the same materials and labor on which the partial payments were computed and paid. Since the payments were made at a 90 percent rate, the payments would be liquidated at the same rate. (R. 175.) The difference would be paid to the contractor in cash. From this it is clear that no large amount of property would pass to the contractor, even though the payments and delivered goods became balanced off in the early part of the contract. This latter fact, moreover, would not likely occur; for the use of money is costly, and there is every incentive for the contractor to hold this investment at the minimum by seeking partial payments to the full amount authorized. Further encouraging the minimization of investment by the contractor is the possibility of termination with the necessarily attendant delay for the contractor in recovering its money. The present case, we submit, is an actual and typical example of how the partial payments provision works. (R. 52–53, 83.)

Having had the experience of purchasing almost two hundred billion dollars worth of equipment, the Government believes it is a safe assumption that when the partial-payment provision was drafted the draftsmen were aware that in the usual case the Government would be paying the major costs of the goods they were

buying as fast as they were incurred. If this is true, then the primary concern of the draftsmen could only be to secure for the Government an interest in keeping with its investment and its obligation to pay the retained percentage on delivery. Nothing less than full ownership would meet this test. A clause so drafted, would also clearly satisfy Section 3648, Revised Statutes, as amended, if it requires receiving property at least equivalent in value to the payments made.

Finally, appellants point (Br. 72–75) to Army Regulations which treat partial payments as a method of financing, and to the Manual for Control of Government Property as evidencing an intent on the part of the Government that its title to the property in question should be merely a security title.[21]

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[21] Concerning the Manual for Control of Government Property (Br. 74) the fact that property acquired by way of partial payments is expressly excluded does not carry with it an implication that the property is any less the property of the Government. Generally speaking, the Manual applies to property of a capital nature such as manufacturing facilities. It is true that it does include provisions for materials which the Government has purchased directly and turned over to contractors. The control over the latter property, however, may be very limited. Armed Services Procurement Regulations (May 10, 1951) Appendix B, Sections 207.1–207.5, 301, 16 Federal Register 4311, 4324. With respect to fixed-price contracts (which is the only type where the Government's ownership is acquired by means of partial payments), the need for such controls is even less, for the risk of loss is minimal. In the normal case the property would be replaced by the contractor and not the Government. The cost of maintaining controls would not be warranted by the occasional loss which the Government might suffer under unusual circumstances.

So far as the appellants argue that partial payments are a form of financing, we have no reason to disagree. Such payments are a means by which the contractor finances a contract which he, otherwise, would or could not handle. It does not follow, however, as a normal inference, that the Government's title to the property is only a security title. What the Government here has done is not to lend the contractor money. It has paid for services performed on its behalf. In so doing it has made an investment in property, and that investment represents 90 percent of the cost of the materials and the labor used in producing the property. It is true that 100 percent of the price of the articles has not been paid, but what is withheld from the total purchase price in making partial payments is no more than is safely sufficient to assure completion of the contract according to its terms. Most of that, however, will be paid during the progress of the contract as deliveries are made. So far as the property is concerned, it is built to the specifications of the Government and, in some cases no doubt, its details are secret in nature. It is property which the Government needs, and from the standpoint of the Government's interest, should not be the subject of litigation as to who is entitled to it. Ownership of the property itself is the only means whereby the Government can maintain necessary control over defense material in process of production, and the best means whereby the Government's investment may be recovered. Thus, it would seem clear that the Government's interest in the ownership of

the property is great. On the other hand, the contractor's investment in the property is relatively small, and in the end the contractor is entitled only to receive the money called for by the contract. To secure that obligation the Government is a better reliance than the property itself. The contractor's concern with the ownership of the property is virtually nil.

Under these circumstances, there is again every reason to suppose that when the Government procurement officers drew the partial-payment clause they intended no less than the words convey, that the Government should have ownership of the property and not a title for security purposes only.

The arguments which appellants here advance are not new. See *Douglas Aircraft Co.* v. *Byram*, *supra*, pp. 315–316. As the state court there pointed out, we are not dealing with the situation where the Government has made a loan with property pledged as security for the performance of the obligation, and with title to be restored when the obligation has been performed. We are not dealing with property which, if all goes well, the contractor expects ultimately to retain for its own use. Here we are dealing with property which the Government has contracted to have manufactured for it into airplane parts. The property was acquired and processed for no other purpose. It is property for which the Government must pay, and to which it will take ownership, whether or not payments are made on the contract price as the work progresses. That the Government, as a result of its experience, chooses to make payments

and take ownership of the property in advance of its delivery as a finished product is a matter for the Government to determine, assuming, of course, there are contractors who desire to accept the contract on those terms.

III

PROPERTY OF THE UNITED STATES IS IMMUNE FROM LOCAL TAXATION

The basic doctrine of implied immunity of property of the United States from local taxation [2] is, of course, well settled by the Court's decisions. *United States* v. *Allegheny County*, 322 U. S. 174; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. The instrumentalities and property of the United States are immune from state taxation or regulation, unless Congress affirmatively provides otherwise (which it has not done here). *Mayo* v. *United States*, 319 U. S. 441, 448.

This immunity does not, as appellants seem to urge (Br. 106, 116, 127-128), come into being only upon a finding that an assessed tax, in fact, constitutes a real interference with the operations of the Federal Government or poses an actual threat to its continued existence. The interest of the United States in its own property is, without more, immune from local taxation, and the tax is not saved from

[2] The legal issues presented under this point are similar to those discussed by the Government in detail in its brief in *United States of America and Borg-Warner Corporation (Detroit Gear Division)* v. *City of Detroit, a Municipal Corporation*, No. 26, this Term, to which we respectfully refer the Court.

invalidity because the local taxing unit has adopted procedures to assess against, and collect from, those in whose possession the property may be found. A tax may not be imposed upon private persons (here the Murray Corporation) to accomplish the collection of a tax against the United States which could not otherwise be levied. *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643, 645; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151; *United States* v. *Allegheny County*, *supra*; *Kern-Limerick, Inc.* v. *Scurlock*, *supra*.

Furthermore, as the cited cases establish, if the tax is in substance a tax on the property of the Federal Government, the tax must fail. Labeling what is clearly an *ad valorem* tax as one *in personam* (Br. 98–106) does not advance the appellant's case. The Court, not being bound either by the form or nomenclature of the tax in determining whether there is an invasion of federal immunity, looks to substance to determine the nature and effect of the levy. *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368. The tax here in issue was measured by the value of property in the possession of the Murray Corporation, which property it is claimed was owned by the United States Government (R. 3–11, 56–57).

As this Court has said in the *Allegheny County* case, *supra*, p. 189: "Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." Also, as this Court has more recently stated in a case involving a bailee of federal property,

a tax measured by the worth of federal property would be void: *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 499.

Those cases which, despite the claim of implied Governmental immunity, have allowed local taxation of those with whom the Federal Government chooses to deal (*James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Alabama* v. *King & Boozer*, 314 U. S. 1; *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342; *Esso Standard Oil Co.* v. *Evans*, *supra*) rest upon the conclusion that the tax in question was one based upon the private person's individual gain or advantage, whether obtained by way of receipts, profits, privilege or ownership. But, as this Court has stated in *United States* v. *Allegheny County*, *supra*, p. 186: " * * * what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands." Thus, if the assessment or levy is, as we believe is clear in the instant case, a tax upon property of the Federal Government, the tax must fail, even though the local taxing unit has confined itself to proceedings against a private person.[33]

[33] " * * * [R]enunciation of any lien on Government property itself, which could not be sustained in any event; hardly establishes that it is not being taxed." *United States* v. *Allegheny County*, *supra*, p. 187. See Appellants' Brief, pp. 103-105.

Therefore, the only question open to appellants is whether the Government owned the property upon which the *ad valorem* personal property tax was assessed or levied. As we have already shown, this question must be decided against the appellants.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX

Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21:

SEC. 2. (a) The provisions of this Act shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the ~~United States Coast Guard~~, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

* * * * *

(10) for supplies or services for which it is impracticable to secure competition;

* * * * *

(41 U. S. C. 1952 ed., Sec. 151.)

SEC. 4. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. * * *

(41 U. S. C. 1952 ed., Sec. 153.)

* * * * *

SEC. 5. (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: *Provided*, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

(41 U. S. C. 1952 ed., Sec. 154.)

SEC. 7. (a) The determinations and decisions provided in this Act to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not

be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

* * * * *

(41 U. S. C. 1952 ed., Sec. 156.)

SEC. 9. As used herein—

(a) The term "agency head" shall mean the Secretary, Under Secretary (if any), or any Assistant Secretary of the Army, of the Navy, or of the Air Force; the Commandant, United States Coast Guard, Treasury Department; and the Executive Secretary, National Advisory Committee for Aeronautics, respectively.

* * * * *

(41 U. S. C. 1952 ed., Sec. 158.)

First War Powers Act, 1941, c. 593, 55 Stat. 838:

TITLE II—CONTRACTS

SEC. 201 [as amended by Sec. 1, Act of January 12, 1951, c. 1230, 64 Stat. 1257]. The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the national defense: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to au-

thorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest: *Provided further*, That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.
(50 U. S. C. App. 1952 ed., Sec. 611.)

Act of January 12, 1951, c. 1230, 64 Stat. 1257:

* * * * *

SEC. 2. Title II of such Act, as amended, shall remain in force during the national emergency proclaimed by the President December 16, 1950, or until such earlier time as the Congress by concurrent resolution or the President may designate, but in no event beyond June 30, 1952.

* * * * *

Revised Statutes:

SEC. 3648 [as amended by Sec. 11 of the Act of August 2, 1946, c. 744, 60 Stat. 806]: No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *
(31 U. S. C. 1952 ed., Sec. 529.)